Supreme Court, U.S.
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No. 95-1842

IN THE

Supreme Court of the United States

October Term, 1995

JOHN M. MERRETT AND CECILIA A. CLAYTON, as personal representative of the estate of Solomon Clayton, Jr., on their behalf and on behalf of all others similarly situated,

Petitioners

v.

JAMES T. MOORE, as Commissioner of the Florida Department of Law Enforcement; ROBERT DEMPSEY, individually; FRED O. DICKINSON, as Executive Director of the Florida Department of Highway Safety and Motor Vehicles; ROBERT BUTTERWORTH; and LAWRENCE CROW, JOHN M. ERVIN, and JERALD VAUGHN; CITY of LAKELAND POLICE DEPARTMENT; CITY of MAITLAND POLICE DEPARTMENT; and CITY of LARGO POLICE DEPARTMENT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS MOORE, DEMPSEY, DICKINSON AND BUTTERWORTH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

Petitioners seek an advisory opinion that future roadblocks — if conducted under old procedures already modified — would be unreasonable. Any conflict with *U.S. v. Morales-Zamora*,

974 F.2d 149 (10th Cir. 1992) is not worthy of certiorari review, because the facts establishing such conflict will not recur.[1]

Petitioners ignore facts which strongly contradict the alleged need for certiorari review of this case.[2] Before the roadblocks at issue took place (January 1984), the Florida Department of Law Enforcement (FDLE) and other agencies developed a "joint operation plan, entitled Interdiction of Illegal Narcotics, North Florida." *Merrett v. Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995) [internal quotes omitted]. Thus, the objective of drug interdiction was acknowledged, and not hidden, from the earliest reasonable opportunity.

The roadblocks were a unique event happening over 12 years ago. Later, FDLE represented to the district court that any future roadblock employing sniff dogs would be conducted in a substantially different manner. Robert L. Edwards, in a sworn affidavit,[3] specified twenty-two ways in which any such roadblock would be changed. Prominent among the changes were: (1) advance site selection and planning to reduce field officer discretion, (2) sufficient drug dogs to permit 15 minute work intervals, (3) smaller-scale and briefer checkpoints, (4) written standards for "turnarounds," (5) advice to motorists about the dogs, (6) periodic

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1 None of the questions presented implicate Respondents Crow, Erwin and Vaughn; the police chiefs for Respondent cities of Lakeland, Maitland, and Largo. Petitioners have, in effect, accepted the Eleventh Circuit's decision exonerating these Respondents, who did no more than provide sniff-dogs for use at the roadblocks.

2 Respondents object to Petitioners' statement, because it contains numerous argumentative footnotes portrayed as fact. *See* Stern & Gressman *Supreme Court Practice* (7th ed. 1993) at 353 ("the Statement of the Case is not the place for argument or editorializing"). Respondents trust this Court will ignore the argument improperly appearing in footnotes to Petitioners' statement.

3 The affidavit is reproduced as the Appendix. At the time, Edwards was the Director of the Division of Local Law Enforcement Assistance, FDLE. His affidavit was attached as Exhibit 1 to the "State Defendants' Cross Motion for Summary Judgment," part of the record at (R8-145-10-15).

checks by supervisors to relieve traffic congestion, and (7) advance publicity. [A-1–A-4][4]

Petitioners raised numerous issues before the 11th Circuit. However, only one — qualified immunity of Respondents Butterworth and Dempsey — addressed compensatory damages. The 11th Circuit held these Respondents[5] were entitled to qualified immunity. *Merrett*, 58 F.3d at 1554, n. 13. None of the questions presented to this Court broach or fairly include qualified immunity. *See Yee v. City of Escondido*, 503 U.S. 519, 535–39 (1992) (discussing the "significant consequences" of the framing of questions in a petition for certiorari, the Court's strong practice of not considering questions outside those presented, and concluding a new question as to regulatory taking was not fairly included in the presented question as to physical taking).

Not having presented a question as to qualified immunity, Petitioners have voluntarily precluded this Court from granting "tangible" relief. Consequently, any need for certiorari review is still further diminished.

ARGUMENT

I. ANY CONFLICT BETWEEN THIS CASE AND *MORALES-ZAMORA* IS NOT WORTHY OF CERTIORARI REVIEW

The undisputed facts reveal that the 1984 roadblocks were unique and non-recurring events. A high-ranking FDLE official filed his sworn statement describing numerous changes which would be made if sniff dogs were used in future roadblocks. These changes, not constitutionally required, confirm that the 1984 roadblocks are now of academic interest only. As

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4 The symbol "A" followed by the appropriate number represents a citation to the materials contained in the Appendix to this pleading.

5 Respondents Moore and Dickinson were not sued individually.

unique and highly fact-bound events, the 1984 roadblocks do not factually support certiorari review.

Construed most favorably to Petitioners, the facts reveal only relatively minor, individual injustices. *See* Stern & Gressman, *supra* note 1 at 353 ("The Court will seldom grant certiorari to correct individual injustices"). Moreover, any such perceived injustices are very fact-specific. Each would be readily distinguishable in future cases, thereby militating against review of this case. *See* S. Baker, *A Practical Guide to Certiorari*, 33 Cath. U.L. Rev. 611, 616 (1984) (certiorari not justified when lower courts are divergent in an area of law, but cannot be "brought into line" through a decision by this Court turning exclusively on facts of a particular case).

In *Morales-Zamora*, the Tenth Circuit noted:

> At the same time, the government agrees that under the Fourth Amendment it could not set up a roadblock for the sole purpose of subjecting all the stopped vehicles to a canine sniff of the exterior of the car. All of which narrows our problem.

Id. 974 F.2d at 151. Without arguing the merits, suffice it to say that the 10th Circuit did not consider whether the roadblock at issue was a dual-purpose roadblock, a point strongly urged by Respondents before the 11th Circuit (answer brief at p. 5–14).

Below, the district court observed:

> At least to this court, it is not abundantly clear that a preplanned, systematic and nondiscriminatory roadblock would be invalid just because it was set up for the lone purpose of interdicting narcotics traffic.

"Order" of May 17, 1992 at p. 15. (Pet. Lodging B, p. 15). In contrast to both the district court below and the Tenth Circuit, the 11th Circuit expressly left the question open. *Merrett*, 58 F.3d at 1551, note 3. Therefore, the refusal to follow *Morales-Zamora* reflects the 11th Circuit's unwillingness to reach an issue not before it, rather than a genuine conflict of decisions warranting certiorari review.

When the 11th Circuit panel denied rehearing, it said only that it was not persuaded by *Morales-Zamora*, a decision reached in a "somewhat similar case." The panel's decision, however, clearly indicates the record was factually insufficient to sustain Petitioners' claim of an unreasonable seizure. *See Merrett* 58 F.3d at 1552, note 10 (concluding that "plaintiffs have failed to produce the kind of evidence in the record which would permit a fact finder to find that a reasonable person would believe he was not free to turn around").

It follows that the panel felt the factual insufficiency of the record prevented the *Morales-Zamora* rationale from being persuasive. The same insufficiency undermines Petitioners' quest for certiorari.

Petitioners quote this passage from the dissent from denial of rehearing *en banc:*

> Under our long-standing precedent...when a law enforcement officer stops a car on the basis of a traffic violation to investigate the possibility that the car is carrying drugs, the stop is unconstitutional if a reasonable officer *would not have made the traffic stop* in the absence of the illegitimate motive. [italics original; citations omitted]

(petition, p. 15) Thus, as a central feature of their argument,[6] Petitioners advance a point of law that has been rejected by all but one of the federal circuits. *See U.S. v. Whren*, 53 F.3d 371, 375–6 (D.C.Cir. 1995), *cert. granted*, case no. 95-5841 (discussing the "would have" versus the "could have" standard and declining to adopt "the more open-ended 'would have' standard of the Tenth and Eleventh Circuits"); and *U.S. v. Botero-Ospina*, 71 F.3d 783, 787-8 (10th Cir. 1995) (*en banc*) (abandoning the "would have made the stop" test, and declaring a stop is valid if based on an observed traffic violation or reasonable suspicion). Now, only the 11th Circuit adheres to the "would have" test.

If this Court holds, in *Whren*, that the "could have" test meets the demands of the Fourth Amendment, then any vestige of need for certiorari review is eliminated. Even Petitioners conceded, before the 11th Circuit, that roadblocks for license checks were constitutional.[7] Since the roadblocks at issue certainly could have stopped cars for license checks, adoption of the "could have" test by this Court would foreclose any inquiry into pretext. It would render meaningless any perceived conflict between the decision below and *Morales-Zamora*.[8]

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6 Petitioners' heavy reliance on pretext stop cases illustrates the weakness of their argument, and the analytical flaw in the reasoning of the dissenters here. The concerns in pretext stop cases are founded on the constitutional issues raised by individual, roving stops; not stops, such as those here, effected in accord with pre-established guidelines.

7 In their initial brief (p. 21–22), Petitioners said:

> Although police roadblocks established to conduct license checks are lawful when properly conducted
>
> * * *
>
> Although FHP certainly could have conducted these license checks absent the FDLE's invalid purpose.

8 Perhaps because it weighs so heavily against Petitioners, the initial petition does not mention *Whren*. However, in their May 8 "Supplement to Petition for Writ of Certiorari," Petitioners offer improper argument on the merits, attempting to evade the effect of an unfavorable outcome in *Whren* (argued April 17, 1996).

The conflict urged by Petitioners is not supported by the record. To the contrary, the record indicates the roadblocks were factually unique and will not recur. If the 11th Circuit erred under such facts, its error is not one demanding immediate correction through certiorari.

Any future roadblocks employing dogs will be substantially different. Petitioners' argument is based on a factually insufficient record, and depends on a point of law already rejected by all but one federal circuit. Certiorari review is not warranted.

II. THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW AND SHOULD BE DENIED.

The conflict perceived by Petitioners is illusory, as it is predicated on events that will not recur. This illusion permeates all four questions Petitioners claim are important enough for certiorari review.

Petitioners quote at length from the dissent from denial of rehearing *en banc,* for its apparent conclusion that fixed but temporary checkpoints are acceptable only to enforce traffic-related laws. This logic would preclude agricultural inspection stations, unless they are always operated at all times, because enforcement of laws regarding agricultural products has nothing to do with safety of the motoring public or compliance with vehicular laws.

QUESTION ONE

The first question[9] is not worthy of certiorari review. It implausibly assumes that law enforcement agencies, by deciding to enforce drug laws through a roadblock, are operating pretextually — regardless of the presence of a motor vehicle-related, constitutional purpose such as license checks.

Petitioners' argument for this question is but one short paragraph. (petition, p. 20) Without analysis, Petitioners rhetorically ask whether this "Court will condone admitted and deliberate evasion of the law." Petitioners' rhetoric is belied by their second question. There, Petitioners ask whether a roadblock "established for the *admitted* purpose of intercepting illegal drugs" [e.s.] is lawful. If drug interdiction is an "admitted" purpose, it cannot be pretextual.

The record shows Respondents always admitted their chief purpose was to intercept illegal drugs. Nevertheless, it is undisputed that Respondents also operated the roadblocks for checking drivers' licenses, vehicle registrations, and safety equipment. *Merrett* 58 F.3d at 1549. That the roadblocks' chief purpose was to intercept illegal drugs does not diminish the validity of the roadblock. Petitioners are attempting to transform the "street-level" pretext stop argument into an opportunity to attack law enforcement agencies at the planning and policy level. Such attempt was expressly prohibited by this Court in *Sitz:*

> But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives [for apprehending drunk drivers] remains with the governmental officials who have a unique understanding of, and a responsibility

---

9 Petitioners' first question reads: "Whether a roadblock established on the pretext of ensuring compliance with traffic related laws, but admittedly designed to intercept illegal drugs, is unreasonably pretextual and therefore unconstitutional."

> for, limited public resources, including a finite number of police officers.

Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 453 (1990).

QUESTION TWO

Petitioners next urge:[10]

> the decision below...authorizes any form of [roadblocks]...so long as law enforcement simultaneously checks driver's licenses. [S]tops and inspections of all motorists leaving mall parking lots for evidence of shoplifting is also permissible, so long as driver licenses are checked."

(petition, p. 21) Petitioners ignore the fact that interstate drug trafficking by automobile is a well-known phenomenon, whereas interstate transport of shoplifted goods is not. Equally obvious, interstate drug trafficking is considered by law enforcement to be a far greater problem than shoplifting.

The roadblocks were premised on the fact that automobiles are commonly used to transport drugs. Thus, there was a substantial connection between the type of crime (drug trafficking) and the enforcement method (roadblock). This connection does not exist in Petitioners' conjecture about roadblocks for shoplifting and "general evidence of crime." (petition, p.21)

Should roadblocks ever be conducted for these purposes, the courts can respond accordingly and in context. Until a sufficient record is presented, this Court should not grant

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10 The second questions reads: "Whether a roadblock established for the admitted purpose of intercepting illegal drugs by subjecting all passing motorists to sniffs by canines and causing substantial delays and hardships to motorists is unreasonable and therefore unconstitutional under the balancing test of *Brown v. Texas*, 443 U.S. 47 (1979)."

certiorari to pass upon something that has not occurred and may never happen.

Petitioners continue their practice of relying on law that is not controlling or persuasive; that is, the *en banc* dissenters' characterization of the balancing test employed in *Brown v. Texas*, 443 U.S. 47 (1979). Then Petitioners vent their displeasure with the panel's decision:

> Indeed, the hardships caused motorists in this operation which went largely ignored in the court's analysis
>
> * * *
>
> Inadequate — if any — weight is given to this important interest [travel] in the analysis conducted by the court below. Nor does the court below meaningfully consider the fact that this operation also subjected many innocent people to fear and humiliation

(petition, p. 21–3) By immediately following the point about balancing, the above quoted language makes it clear Petitioners simply disagree with the lower court's rationale.

Also, Petitioners misunderstand the record. Rather than subjecting "many people to fear and humiliation" — a claim for which Petitioners cite no record support — the use of dogs to sniff the exterior of vehicles quickly eliminated all but 28 of the 1450 vehicles sniffed. *Id.* at 1549. Nothing in the record indicates any of the passengers in the 1422 eliminated vehicles were humiliated. In fact, nothing in the record indicates more than a few of the passengers in the 28 searched vehicles

were subject to fear or humiliation. Nothing indicates this fear or humiliation was a reasonable reaction.[11]

Again, Petitioners have not contested the Eleventh Circuit's holding as to qualified immunity. Petitioners' decision belies their claim of "hardships to motorists." Moreover, Petitioners' mischaracterization of the record cannot stand even casual scrutiny and presents no basis for certiorari review.

QUESTION THREE

Had they adduced sufficient evidence to provide a factual basis for this question, Petitioners might have raised a cognizable issue.[12] They did not. As the panel aptly explained, the record was insufficient to "permit a fact finder to find that a reasonable person would believe he was not free to turn around." *Id.*, 58 F.3d at 1552, note 10.

The decision below found it worthwhile to discuss only one event: the motorist who was told he could not leave the line, and thus was "seemingly seized" for the 20 minutes he was

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11 The opinion below noted that "one minor accident occurred; the dogs scratched several cars; and one person was bitten by a dog." 58 F.3d at 1549. These unintended mishaps may constitute tort claims, but are not of constitutional significance. *See Ansley v. Heinrich*, 925 F.2d 1339, 1344 (11th Cir. 1991) ("unintended consequences of government action could not form the basis for a fourth amendment violation"); *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) (use of dog to apprehend burglary suspect not excessive, when suspect died from being grabbed by neck, as no evidence indicated the handler intended such or that handler deviated from standard procedure; therefore, suspect's estate was precluded from recovery in a civil rights action); *Streetman v. Jordan*, 918 F.2d 555, 557 at n. 3 (5th Cir. 1990) (any injury suffered by person when police officers, during a search, confiscated electronic equipment, left food out to spoil, and left without turning off lights or locking door involved negligence and were not actionable under section 1983), *citing Daniels v. Williams, 474 U.S.* 327, 334, 106 S.Ct. 662, 666, 88 L.Ed.2d 662 (1986).

12 Petitioners' third question is: "Whether a motorist in a line leading up to a roadblock is "seized" under the Fourth Amendment, where a law enforcement officer in a patrol car is visibly positioned to, and does, chase down motorists who leave the line, and subjects the motorists to license checks and a canine sniffs."

in the line. *Merrett,* 58 F.3d at 1552. But, as the panel concluded, "no other violations are supported by the record."[13]

Petitioners re-argue the merits. This, too, is not the basis on which certiorari review should rest.

QUESTION FOUR

This question[14] is the weakest of all. Petitioners contend the issue is "whether canine sniffs establish probable cause to search where the canines incorrectly signaled the presence of drugs in 27 of 28 instances."

Preliminarily, Petitioners have not challenged the adequacy of the dogs' training or the competence of the handlers. Rather, they rely on an after-the-fact observation that only 1 in 28 dog-alerts resulted in an *arrest* for drug possession. The flaw in this approach is obvious. It makes probable cause turn on an after-the-fact success ratio as determined by arrests, rather than the accuracy of alerts. Such ratio has nothing to do with whether an individual dog-alert, at the time it occurred, was reliable. Petitioners' logic must fail, as it is akin to urging the validity of arrests depends on the conviction rate. *See Marx v. Gumbinner,* 905 F.2d 1503, 1507 (11th Cir. 1990) ("[T]hat a defendant is subsequently acquitted or charges are dropped is of no consequence in determining the validity of the arrest itself").

Petitioners success ratio approach would foster much after-the-fact conjecture as to when a dog should not be considered reliable, and force officers to continually re-assess their conclusions of probable cause. The Fourth Amendment does not

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13 Respondents are not asking this Court to condone 20 minute seizures under any and all circumstances. However, the motorist was allowed to leave the line when his car overheated. *Id.* at 1552, note 9. At most, this is a classic example of an individual injustice not warranting certiorari.

14 Petitioners' last question asks: "Whether canine sniffs establish probable cause to search where the canines incorrectly signaled the presence of drugs in 27 of 28 instances."

require as much. *See Thompson v. Olson*, 798 F.2d 552, 556 (1st Cir. 1986) ("[H]aving once determined that there is probable cause to arrest, an officer should not be required to reassess his probable cause conclusion at every turn.").

Ignoring the facts, Petitioners erroneously contend this "issue is important because Respondents have promised to repeat this operation." (petition, p.27) As described in the Edwards affidavit [A-1], any future roadblocks employing sniff dogs will be conducted in a substantially different manner. Moreover, Petitioners have never disputed this representation.

If future roadblocks were to violate the Fourth Amendment, the lower courts will deal with the violation within the ambit of decisions such as *Sitz; Brown v. Texas;* and *Horton v. California*, 496 U.S. 128 (1990). Petitioners' argument that "law enforcement around the country is likely to adopt these tactics" is conjectural at best, and not a basis for certiorari review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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A. Affidavit of Robert L. Edwards A-1

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF LEON

BEFORE ME, this day personally appeared ROBERT L. EDWARDS who, being first duly sworn, said on oath:

1. My name is Robert L. Edwards. I am the Director of the Division of Local Law Enforcement Assistance, Florida Department of Law Enforcement. In that capacity I have the authority, subject to approval of Commissioner Robert Dempsey, to prescribe guidelines and organizational plans for future license and vehicle equipment check/drug interdiction operations of the type last accomplished in January 1984.

2. Based upon after action reports following previous operations (copies attached hereto as Exhibits A, B, C and D), it is the intention of the Department of Law Enforcement to continue to observe the following guidelines in all future operations of this type:

(a) Basic procedure guidelines observed in the January 1984 operation will continue to be followed in the future.

(b) Advance site selection and planning will be accomplished by supervisors in this Department and in other participating agencies so as to minimize discretion on the part of officers in the field;

(c) Vehicles will be stopped in a pre-established systematic fashion;

(d) There will be sufficient display of the official law enforcement insignia to comfort the public;

(e) Motor vehicle and participant safety will continue to be of paramount importance;

(f) Sufficient numbers of narcotic trained detection dogs will be used to permit rotation at 15 minute intervals; handlers will be required to advise if individual dogs need additional rest or should otherwise be removed from the operation;

(g) The number of law enforcement personnel on site will be strictly limited to designated participants with prescribed roles;

(h) Future operations will be smaller in scale with briefer check points;

(I) Preoperational briefing and written guidelines are not intended to cover every conceivable contingency as such prescription would be self-defeating and would impair efficient and effective operation;

(j) Certain contingencies will be emphasized in future operations, including dogs will not be permitted in vehicles; dog alerts will be confirmed by a second dog alert before consent to search vehicle interior is sought;

(k) Standards for dealing with "turnarounds" will be established in writing;

(l) Supervisory personnel will determine in advance whether traffic flow in one or both directions will be blocked;

(m) Written records will be kept of all vehicles to which dogs alert, including tag number identification, documentation of consent, results of search, and explanations by vehicle

occupants, identification of participating law enforcement;

(n) All participating officers involved in vehicle searches will be furnished a check list of procedures to follow upon a dog alert;

(o) Prior to the commencement of each operation and approximately every 30 minutes thereafter while the operation continues, the roadway and shoulder in the vicinity of the check points will be checked for contraband;

(p) Contraband will be retained with the location and time of finding noted;

(q) Arrests or citations will be made for all law violations noted unless in the informed discretion of the supervisory officer in charge an arrest should not be made;

(r) Motorists will be advised of the purpose of the dogs' presence as soon as practical and will be told to keep their windows rolled up and not to lean out of their vehicle while the dog circles;

(s) Consent to search will be sought from vehicle occupants as before, with information that a search warrant will be sought from a judge if consent is withheld; Prior planning will be used to expedite the search warrant application process. Reliance on search warrants to permit vehicle search does not mean that FDLE believes a warrant would constitutionally be required under the circumstances here presented;

(t) Motorists producing a prescription drug as possible explanation for a dog alert will be

courteously acknowledged, but will be advised that, for the operation to be effective and non-discretionary, all vehicles on which an alert is confirmed must be searched;

(u) Searches will be brief, thorough, and will minimize inconvenience to the public.

(v) Periodic checks will be made by supervisory staff to determine how long vehicles are waiting in line prior to reaching the check point. "Wave throughs" will be made when supervisors deem appropriate under uniform standards to relieve traffic congestion;

(w) Advance publicity of the intention to conduct future operations will be released to alert the motoring public of the possibility of such operations without disclosing the precise times or locations;

3. The emergence of efficient, effective and constitutional law enforcement operations is an evolutionary process shaped by prior police experiences and the contours of case law. As was done with all prior drug interdiction operations, future operations will be scrutinized at their termination by participants and FILE administrators and attorneys, and proposals for further refinements will be made and considered.

/S/
ROBERT L. EDWARDS

[notarization and exhibits omitted]